United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL WITH AFFIDAVIT OF MAILING

76-1194

To be argued by
JOSEPHINE Y. KING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1194

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P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

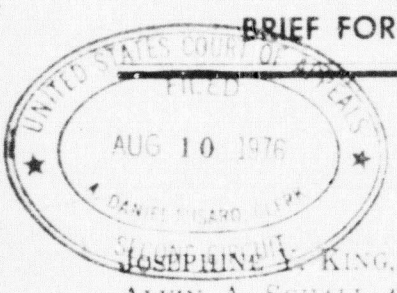
—v.—

PHILIP RASTELLI, ET AL.,
Defendants,

JOHN JOSEPH SUTTER, Esq.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLEE



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Defendant-Appellant.

BRIEF FOR THE PLAINTIFF-APPELLEE

Preliminary Statement

John J. Sutter, Esq., originally counsel for Philip Rastelli, appeals from an order entered in the United States District Court for the Eastern District of New York on March 30, 1976 by the Honorable Thomas C. Platt, imposing costs of $500 for each of three days delay caused by appellant's conduct. Mr. Sutter has paid the $1,500.00 costs.

Statement of the Case

The underlying litigation in which John Joseph Sutter, Esq., originally appeared involved the prosecution of defendants Philip and Louis Rastelli, Anthony DeStefano, Carl Gary Petrole and the Workmen's Mobile Lunch Association, Inc. Mr. Sutter represented Philip Rastelli.

On March 5, 1975, Philip, his brother Louis,[1] and the other defendants were indicted for allegedly engaging in a combination in restraint of trade and obstructing commerce by acts of extortion, all in violation of 15 U.S.C. § 1 and 18 U.S.C. §§ 1951, 1961, 1962(c) and 2. The next day bench warrants were issued, the Rastellis were produced in court, each pled not guilty and bail was set. The Government filed a notice of readiness on March 18, 1975 and the case was called by Judge Platt on March 21, 1975. That same day, a certificate of engagement was issued to Mr. Sutter, for trial to commence on April 4, 1975. Two days before this trial date, the court received a telegram from Mr. Sutter's office asking for an adjournment because Philip Rastelli was hospitalized (A. 62a).[2] May 9, 1975, was set as the new trial date.

From May 9, 1975, until the early part of January, 1976, the trial was postponed not less than five times at the defendants' request. On May 9, 1975, one of Rastelli's co-defendants was arraigned and pled not guilty; defendants requested an adjournment of the trial to September 5. On September 5 and November 10 and 14, 1975, the case was adjourned at defendants' request, no reason being specified in the record. Defendants then selected, and the court granted, a new trial date, January 5, 1976. But on December 29, 1975, Mr. Sutter moved for a hearing to determine Philip Rastelli's capacity to stand trial. The court ordered a physical examination; the medical report submitted by Dr. Michael Weingarten advised that defendant was capable of standing trial.

On January 5, 1976, counsel for Philip Rastelli requested a postponement of the trial to enable defendant

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[1] A motion for severance of the trial of Louis Rastelli was granted on March 29, 1976.

[2] All references are to pages of appellant's appendix.

to undergo elective surgery. The Court acceded to this request.[3] Thereupon, on January 5, 1976, all counsel agreed on a firm trial date of March 29, 1976 and certificates of engagement were issued to counsel, including Mr. Sutter (A. 120a).

Just 10 days before the scheduled trial, on March 19, 1976, Stephen Willson, Esq. an associate of Mr. Sutter, informed the Court that defendant Rastelli wished to change counsel. Michael A. Rosen, Esq., of Saxe, Bacon & Bolan, the firm proposed to be substituted, requested a thirty day adjournment (A. 10a, 16a).

I. The Proceedings of March 19, 1976.

A pretrial conference was called by the Court for March 19, 1976 because it had "heard rumors to the effect there might be some difficulty in getting the case started on March 29th." (A. 99a).[4]

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[3] However, defendant chose not to undergo the surgery for which the January 5, 1976, adjournment had been granted. Defendant, who was incarcerated following his conviction in State court, apparently declined to accept the arrangements made for him by the Clinton Correctional Facility to have the surgery performed by a private physician in a hospital.

[4] The details of how information concerning Mr. Sutter's non-availability for the Rastelli trial reached the District Court were developed at the hearing of March 30, 1976.

> Mr. Sutter: I assumed this Court was advised of my engagement and I have reason to believe, if your Honor please, that the "rumor" that your Honor had was implanted by my own firm so that you were apprised, and I think Mr. Wilson is prepared to make a statement as to how your Honor was apprised of the fact that I was engaged on that trial. It came from my firm.
>
> The Court: Even assuming that to be the fact, Mr. Sutter, that is no way to apprise the Court, let it be rumored you may not be available.

[Footnote continued on following page]

At this conference, the District Court was informed for the first time that Mr. Sutter was engaged in a trial which had commenced on March 8, 1976, in County Court, Nassau County, before the Honorable Alfred F. Samenga. Michael Rosen, Esq., of Saxe, Bacon & Bolan, was present and stated that his firm had been contacted by Mr. Rastelli who had requested that the firm represent him in the case pending before Judge Platt (A. 11a). Stephen Willson, Esq., an associate of Mr. Sutter, appeared for defendant Rastelli and advised the Court that Mr. Sutter had "not given this case the attention it deserves . . . the preparations have been spotty, to say the least. I do not blame Mr. Rastelli for trying to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect." [5]

Mr. Sutter: It was not rumored, Judge, somebody was told about it.

The Court: Well, I think I have stated my position pretty clearly on the subject. I do not know how I can make it clearer to you.

Mr. Bornstein: I have to stand up at this point because of what Mr. Sutter said and simply to reply that there was a point, I believe sometime prior to the 19th, that Mr. Wilson did call me. We discussed several topics, amongst which he indicated to me the possibility that Mr. Sutter was actually going to be engaged. I told him I was going to call the Court on the basis of this and I respectfully did want to mention I know I did so. Whether Mr. Wilson took this to mean he was relieved from the responsibility I do not know, but I did tell him we were going to be calling for a pretrial conference. There was a subsequent conversation I know as well, where I know with regard to a different matter I suggested Mr. Wilson call the Court directly, but I do know at this point that Mr. Wilson did tell me at least in part about this matter. I told him I would call the Court. I do not know whether he took that as relieving him of the responsibility. I simply wanted to put that on the record. (A. 115a-117a).

[5]. A. 9a-10a. Later, Mr. Wilson again stated that "we have . . . not adequately prepared for" this case (A. 13a).

The Court expressed its willingness to have counsel substituted provided the trial commenced on the firm date previously set, March 29, 1976. The Court reminded Mr. Willson and Mr. Rosen that the defense attorneys had themselves selected March 29th as the trial date and that the case had been on the calendar for a full year. Mr. Rosen requested a 30 day adjournment (A. 16a) which the Court denied, Judge Platt noting that the Government would be likely to take six weeks in presenting its case, thus affording defense counsel time for preparation.

In summary, the hearing of March 19, 1976, was the first time the trial judge was informed in open court that Mr. Sutter was not prepared to conduct Rastelli's defense, that he was, in fact, in the midst of another trial in Nassau County, that the defendant wished to discharge Mr. Sutter and retain other counsel and that the proposed substituted counsel was requesting a 30 day delay in the commencement of the trial.

II. The Proceedings of March 24, 1976.

Judge Platt called the case on March 24, 1976 to resolve several matters. One of these concerned the representation of Philip Rastelli. In this connection, the Government offered to consent to a one week adjournment, because of its concern to avoid "even the appearance that Mr. Rastelli may not have adequate representation, based on his current counsel's admission to Your Honor that he has not prepared . . ." (A. 40a).

The Court adhered to its original position, however, and expressed confidence in Mr. Sutter's competence to try the case. (A. 41a). Judge Platt again explained that he and other judges in the district had rearranged

schedules to make certain that the specific trial time requested by counsel would be reserved for this case.

> There was a date set by the parties and their counsel. The trial was set, and everybody said they would be ready. And I have moved everything around in this court, and in several other courts, to have this space available starting March 29th for this trial and I am not going to change. The judges in this court have a very busy schedule. In this case it is not fair. Just because Mr. Rastelli at this point wants to change his mind and get another counsel. I make my position abundantly clear. You can mandamus me to the Court of Appeals . . . (A. 41a).

III. Defendant's Application to the Court of Appeals for a Writ of Mandamus.

On March 26, 1976, the District Court was served with a petition for a writ of mandamus to the Court of Appeals by Saxe, Bacon & Bolan, requesting a continuance of one week (until April 5, 1976). Although in the affidavit submitted with the petition Saxe, Bacon & Bolan stated they were attorneys for Philip Rastelli, the firm had not in fact filed a Notice of Appearance (A. 150a). And as Judge Platt noted on March 29th in referring to the mandamus application, the petitioner did not apprise the Court of Appeals of the protracted history of delay and defense-initiated adjournments of the Rastelli trial (A. 65a-66a).

The Court of Appeals denied the writ on March 29, 1976, concluding that under *Stans* v. *Gagliardi*, 485 F.2d 1290 (2d Cir. 1973), it lacked power to consider the matter, whether raised on appeal from an interlocutory order or by way of petition for mandamus. At the

same time the Court requested Judge Platt "to reconsider the equities, interests and policies underlying his denial of the request for the continuance." *Rastelli* v. *Hon. Thomas C. Platt*, 534 F.2d 1011, 1012 (2d Cir. 1976).

IV. The Proceedings of March 29, 1976.

On March 29, 1976, the day set for trial, the case was called. Judge Platt acknowledged receipt of an affidavit of Mr. Sutter, dated March 26, 1976 (A. 46a-51a), in which Mr. Sutter requested an adjournment of at least four weeks (A. 51a).[6] The Court noted that Mr. Sutter had not informed the court in Nassau County, at the time he commenced the Charmont trial there on March 8, 1976, of his engagement for the Rastelli trial. Judge Platt further stated that Judge Samenga, with whom he had spoken that morning, had informed the Court that he had no knowledge of Mr. Sutter's prior engagement and could not release him except for two or three days. The affidavit of March 26th, observed the Court, was the "first application . . . from Mr. Sutter for an adjournment on the basis that he was otherwise engaged . . ." (A. 96a).

No substitution of counsel having been effected, the Court informed Mr. Willson that he would have to try the case. Mr. Willson remarked that the defendant did not wish him to try the case (A. 57a). Whereupon Judge Platt commented: "The alternative you leave me, Mr. Willson, is to fine Mr. Sutter" (A. 58a). "[I]f... you are going to refuse to try the case, the alternative

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[6] Mr. Sutter explained in his affidavit that he had been retained to defend one Gregory V. Charmont, charged with attempted murder, and that the trial in that case had commenced on March 8, 1976 (A. 46a-47a).

would be a fine of $1,000 a day on Mr. Sutter until he appears" (A. 59a). The Court expressed willingness to hear Mr. Sutter on the matter, and consented to Mr. Willson's request for an opportunity to contact Mr. Sutter.

The Court then reviewed the history of the case in order "that the record will be clear as to why the Court is taking the actions it proposes to take." (A. 61a). Judge Platt recalled that from the date of the indictment, March 5, 1975, there had been many adjournments. Only one of these was at the behest of the Government (A. 65a). When defendants selected March 29, 1976, as the trial date, the Court told counsel "to make it known to any Court where they were involved that they would be involved here at this Court and they all assured me that they would be here and ready on March 29th." (A. 63a).

When he was informed during the proceedings that the Court of Appeals had denied the writ of mandamus requested by Saxe, Bacon & Bolan, Judge Platt stated he would "impose a contingent fine of $1,000 on Mr. Sutter for his failure to appear . . ." (A. 66a). The Court offered to hear Mr. Sutter on the matter.

V. Pretrial Conference of March 30, 1976.

At a pretrial conference on March 30, 1976, Mr. Sutter, for the first time, and his partner James R. Moffatt, Esq., were present. Mr. Moffatt, representing Mr. Sutter, stated that as he read the transcript of the preceding day ". . . Your Honor has not in fact held Mr. Sutter in contempt. What Your Honor required and directed was that Mr. Sutter appear before you." The Court responded: "I did not require, I gave him the opportunity." (A. 92a).

As a preface to his explanation of why Mr. Sutter was not ready to go forward with the trial, Mr. Moffatt

averred that his partner had not committed the intentional and wilful violation of a court directive to make him liable under the criminal contempt statute.[1] The Court, without in any way affirming that it had cited Mr. Sutter for contempt (and in fact it had not), reminded Mr. Moffatt that Mr. Sutter had at no time informed Judge Samenga of his prior commitment in the Eastern District or informed the District Court of his unavailability for March 29th. "Indeed it came as a complete surprise to Judge Samenga when I called him and mentioned this problem to him yesterday morning [March 29th]," Judge Platt commented (A. 96a). Judge Platt continued:

> The first application I have from Mr. Sutter for an adjournment on the basis he was otherwise engaged came in Friday afternoon after a full jury panel had been impaneled here and I had repeatedly told counsel, including Mr. Wilson, we were going ahead on March 29th.
>
> To make matters even worse I do not suppose I would have even heard about the fact that he was on trial in another case had I not on my own motion some ten days before demanded all counsel appear here because I heard rumors, rumors that there might be some difficulty in getting this case strated for trial. (*Id.*)

Mr. Moffatt related that Mr. Sutter, when commencing the criminal trial in Nassau County, believed it would take only two weeks. As of that date (March 30th), however, he anticipated the trial would continue for two or three weeks. (In fact, the trial lasted six weeks. Appellant's Brief at 12). Mr. Sutter requested a three day adjournment of the Rastelli trial so that new counsel could be substituted (A. 104a-105a).

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[1] Mr. Moffatt referred to 18 U.S.C. § 301; Judge Platt offered a correction of the citation to § 401 but in no way confirmed that Mr. Sutter was cited for contempt (A. 92a).

The Court responded that it had not heard any satisfactory reason why Mr. Sutter did not inform the Court before March 26th of his engagement in Nassau County. Judge Platt also emphasized that it was not now and had never been his intention to defy the Court of Appeals (A. 105a). Thereupon the Court offered Mr. Lang of Saxe, Bacon & Bolan the opportunity to proceed on April 5 if he could not proceed on Thursday, April 1. Mr. Lang agreed to select a jury and open on April 1 (A. 109a).

Judge Platt then reviewed a "rough draft" of his opinion. It stated that the Court had tentatively imposed a fine of $1,000 a day on Mr. Sutter for his failure to commence trial on March 29, but the Court decreased the sum to $500 for each day of delay. In the final Memorandum and Order of March 30, 1976, Judge Platt stated that a fine of $1,000 a day had tentatively been imposed on John J. Sutter, Esq. and that Mr. Sutter had received a hearing before any permanent sanction was determined. The Court then imposed costs of $500 for each day of delay from March 29 to March 31 caused by Mr. Sutter's conduct (A. 145a-152a).

ARGUMENT

The District Court properly imposed costs of $500 a day on appellant for his inexcusable failure to honor his long-standing commitment to commence the Rastelli trial on March 29, 1976.

Appellant's argument, in the main, is that Judge Platt held him in criminal contempt without cause and without complying with the procedural requirements of F.R. Crim. P. 42(b). We disagree. In the first place, Judge Platt never cited Mr. Sutter for contempt. On the contrary, the basis for the District Court's order imposing costs on counsel was the inherent power of the

Court, as reflected in the rules of the Eastern District, to assure the fair and effective administration of justice and to supervise the conduct of the legal profession. Furthermore, and most importantly, Judge Platt's imposition of costs on appellant was fully justified by appellant's own conduct.[8]

I

Rule 8 of the Individual Assignment and Calendar Rules of the United States District Court for the Eastern District of New York provides, in pertinent part, as follows:

> Rule 8—Sanctions:
>
> (a) *Dismissal or default.* Failure of counsel for any party . . . to be prepared to proceed to trial at the time set, may be considered an abandonment of the case or failure to prosecute or defend diligently, and an appropriate order may be entered against the defending party either with respect to a specific issue or on the entire case.
>
> (b) *Imposition of costs on attorneys.* If . . . a judge finds that the sanctions in subdivision (a) are either inadequate or unjust to the parties, he may assess reasonable costs directly against counsel whose action has obstructed the effective

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[8] Significantly, Mr. Sutter's associates, speaking on his behalf, did not consistently comprehend the proceedings as a criminal contempt. Mr. Wilson referred to a "contempt situation" on March 29, 1976 (A. 85a), but Mr. Moffatt, appearing before Judge Platt the next day, expressed the opinion that ". . . Your Honor has not in fact held Mr. Sutter in contempt." (A. 92a). Later on, in arguing that Mr. Sutter had not wilfully or intentionally defied a mandate of the Court, Mr. Moffatt referred erroneously to T. 18, U.S.C. § 301. Judge Platt merely corrected the citation—"401 I believe is the section." (A. 92a). He did not confirm in any manner that he was citing Mr. Sutter for criminal contempt.

> administration of the court's business. (at 138.6).[9]

In this case, there can be no doubt that Judge Platt was acting under the authority of Rule 8(b). As indicated above, the Court at no time stated that it was holding appellant Sutter in contempt. Instead, Judge Platt said in his Memorandum and Order of March 30, 1976, that he was imposing costs because "Mr. Sutter's conduct . . . has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other Judges, has inconvenienced the co-defendants and their counsel and has required the unnecessary conventions of a jury panel." (A151a-152a). By thus stating the effect of appellant's conduct, Judge Platt made it crystal clear that he was imposing costs because appellant's actions had "obstructed the effective administration of the court's business," as contemplated in Rule 8(b). As we will demonstrate below, moreover, the Court's actions were entirely proper. Indeed, in imposing sanctions upon Mr. Sutter, Judge Platt was acting in accordance with his responsibility for the management of the court's business and the efficient administration of justice.

Standards of conduct for members of the legal profession apply to both judges and attorneys. The Canons of Judicial Ethics state that:

> A judge . . . may well endeavor to hold counsel to a proper appreciation of their duties to the public interest, to their own clients, and to the

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[9] Compare T. 28, U.S.C., § 1927, pursuant to which an attorney can be held personally responsible for excessive court costs incurred as a result of his own unreasonable behavior. *See also, Motion Picture Patents Co.* v. *Steiner et al*, 201 F.63, 65-66 (2d Cir. 1912), and *Gullo* v. *Hirst*, 332 F.2d 178 (4th Cir. 1964).

> adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the Court.[10]
>
> Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the Court . . . to make it useful to litigants and to the community.[11]

The American Bar Association Standards for Criminal Justice provide that:

> § 1.2(a) Defense counsel should avoid unnecessary delay in the disposition of cases . . .
>
> * * * * *
>
> (d) A lawyer should not accept more employment than he can discharge within the spirit of the constitutional mandate for speedy trial and the limits of his capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.[12]

More specifically, the respective responsibilities of judge and counsel in the instant case are articulated in the rules of the United States District Court for the Eastern District of New York.

The judge is charged with managing his calendar so that his efforts result in the "effective administration

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[10] American Bar Ass'n, The Canons of Judicial Ethics, Canon 18.

[11] *Id.*, Canon 2. *Compare* American Bar Ass'n, Code of Professional Responsibility, EC 7-38, 7-39 (1970).

[12] American Bar Ass'n, Project on Standards for Criminal Justice, *The Defense Function*, § 1.2—Delays; punctuality (1974).

of justice." [13] Obviously, this entails directives to counsel in secheduling cases for trial.[14] The Court's duty to assure the prompt disposition of criminal cases is complemented by the obligations of defense counsel and prosecutor. "Neither a conflict in schedule of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time." [15]

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[13] United States District Court, Eastern District of New York *Individual Assignment and Calendar Rules*:

> Rule 6(a)—Calendars: . . . Each Judge shall dispose of cases assigned to him as required by law and *effective administrative of justice.* (at 138.4) [Emphasis supplied].

[14] *Id.* Rule 7—Conference: After a case has been assigned, the judge may direct the attorneys for each party to meet with him to discuss the case informally, to entertain oral motions and, to the extent possible and desirable, to discuss settlement or to set a schedule for the case, including for discovery, pre-trial and trial. (at 138.6).

[15] United States District Courts for the Southern and Eastern District of New York, *Criminal Rules, Plan for Achieving Prompt Disposition of Criminal Cases*:

> 10—Responsibility of United States Attorney and Defense Counsel
>
> (a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedule of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce it is ready for trial. (at 166.14).

The plain fact is that in this case appellant Sutter failed, in the District Court, to meet his professional responsibilities. On January 5, 1976, after numerous adjournments requested by the defense, the lawyers selected March 29, 1976, as a firm trial date. Thereafter, Judge Platt, in his own words, "moved everything around" in his court, "inconvenienced every other judge," specifically arranged with Judge Weinstein to "share" the time of one defense attorney, and was compelled to decline an urgent case which Chief Judge Mishler requested him to take (A 10a, 39a, 41a-44a, 100a-101a).[16] Under these circumstances, it is clear that appellant Sutter had an obligation to the Court, the Government and co-counsel to be ready for trial on March 29th. Instead of meeting this obligaiton, however, appellant became engaged in another matter in Nassau County. Moreover, he entered the Nassau County case without either notifying Judge Platt or informing Judge Sameriga of his prior commitment in the Eastern District. The imposition of costs by Judge Platt was a proper exercise of judicial responsibility in response to appellant's conduct and was well within the Court's discretion.

Furthermore, the costs imposed by Judge Platt under Rule 8(b) were clearly reasonable. If viewed as compensatory, $500 a day is but a token of payment towards the expense involved in one day's trial. Here, in addition to the judge and court personnel, a jury panel of 75 members was called on March 30th, solely for Judge Platt, and a second panel of 130 persons was called on March 31st, also solely for Judge Platt. When these obvious expenditures are supplemented by the wasted time and inconvenience caused to other attorneys and

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[16] The Court was clearly making a determined effort to see that the Rastelli case, which had already "been on the calendar for one solid year" (A. 14a), proceeded to trial without further delay.

litigants, $500 a day in costs scarcely amounts to "financial reprisal" or "retribution," as appellant contends.[17]

Totally without merit are appellant Sutter's claims that (1) the disruption in the District Court's schedule was occasioned by an unforseeable miscalculation of the duration of the Nassau trial, that (2) he properly informed Judge Platt of the conflict in his trial engagements and that (3) there was no misconduct or obstruction of justice on his part to warrant the imposition of any sanction.

To begin with, we submit that by taking on the Nassau case Mr. Sutter exceeded "the limits of his capacity to give each client effective representation." (ABA Standards, § 1.2(d), *supra*). We note that while an attorney should not be faulted for misestimating the length of a trial, such misestimates are hardly so totally unforeseeable that no thought need be given to substitution of counsel prior to the time a conflict arises, especially where, as here, a certificate of engagement has been issued. Likewise, appellant can hardly rely on the contention that he promptly and properly notified the District Court of the conflict through his associate, Mr. Willson. Quite simply, we fail to see how it could not have been clear to an attorney of Mr. Sutter's experience that it was his responsibility to communicate directly and immediately with the federal court concerning his acceptance of another major trial and to ensure the availability of adequately prepared substitute counsel. Instead, as late as March 26th, he asked the District Court for an adjournment of four weeks which would patently have produced the "long delay and large expense" that Justice

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[17] Since this was a criminal case, the sanctions available under subdivision (a) of Rule 8 were clearly inappropriate. Accordingly, they were "inadequate" within the meaning of subdivision (b) of Rule 8.

Douglas recognized as an obstruction of justice, *Nye* v. *United States*, 313 U.S. 33,52 (1941). Finally, in response to the claim that appellant's conduct did not warrant the sanctions imposed by the Court, it is enough, in order to show that Judge Platt's actions were proper, simply to point again to the dislocation, cost and inconvenience caused in the District Court by the Rastelli case. In short, the imposition of costs on appellant under Rule 8(b) was fully justified.

II

Appellant's additional arguments, based on the contention that he was improperly held in contempt by Judge Platt, are readily disposed of. As established above, this was not a contempt case. Judge Platt acted under Rule 8(b) of the Eastern District Individual Assignment and Calendar Rules. Nevertheless, even if we were to assume *arguendo*, that this was a contempt case, the result would be the same. The record clearly shows that the procedural and substantive requirements for criminal contempt were satisfied. T. 18, U.S.C. § 401; F.R. Crim. P. 42(b); *United States* v. *Meyer*, 346 F. Supp. 973, 978 (D.C. 1972).[18]

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[18] In the amicus brief of the Bar Association of Nassau County, it is urged that although Judge Platt's authority for imposing costs is rooted in Rule 8 of the Individual Assignment and Calendar Rules, *supra*, the requirements applicable to criminal contempt (T. 18 U.S.C. § 401) must be observed. This is to say that the Court may not impose sanctions under Rule 8 without a finding that counsel's conduct "was the product of wrongful intent." (Amicus Brief at 17). Such a construction would make Rule 8 supererogatory. To the contrary, we submit that Rule 8 is a distinct and independent authorization for administrative sanctions to be imposed in the sound discretion of the judge. It does not import the stigma of a contempt citation and need not be predicated on egregiously disrespectful or disruptive acts committed with a wrongful intent. Rather, as a necessary but milder form of judicial control of the court's business, Rule 8 provides for the imposition of sanctions for certain actions which prevent or impede the effective administration of "the court's business."

Regarding the procedural requirements, the Government contends that Judge Platt accorded Mr. Sutter due process of law. Mr. Sutter was advised of the charges and had "a reasonable opportunity to meet them by way of defense or explanation." *Cooke* v. *United States*, 267 U.S. 517, 537 (1925). On March 19th, Judge Platt informed Mr. Sutter's associate that Mr. Sutter or substituted counsel would have to be prepared to commence trial on the previously agreed upon date of March 29th. On March 29th, Judge Platt gave oral notice in open court that if counsel was not prepared to conduct Philip Rastelli's defense, Mr. Sutter would be fined $1,000 for each day he or substituted counsel did not appear. At the same time, Judge Platt stated his readiness to hear Mr. Sutter on the matter. At this point, the fine was contingent, the reasons for its *prospective* imposition and been repeatedly explained in open court. The record does not therefore support appellant's allegation that the Court was "predisposed to punish Mr. Sutter." (Appellant's Brief at 15).

On March 30th, Mr. Sutter was present, and he and his representative, Mr. Moffatt, were afforded the opportunity to present their explanations of the reasons Mr. Sutter was not prepared to try the Rastelli case. The seventeen pages of transcript (A. 90a-107a) of the colloquy engaged in by the Court and counsel refutes appellant's characterization that this was a "cursary [sic] hearing." (Appellant's Brief at 15).

Also without merit would be appellant's claim that there was lacking on his part the necessary intent for contempt. Intent to obstruct the administration of justice is not limited to malicious conduct or malevolent desire to disrupt the orderly procedure of a court. It can also be found where one in full knowledge of a long standing commitment to a fixed trial date recklessly

risks his availability by reliance on an estimate that a very serious criminal case will entail only two weeks trial before another court, and regards his earlier certificate of engagement as "inconsequential." (Appellant's Brief at 13).

Furthermore, this case reveals, by admission of Mr. Sutter's associate, that pretrial preparation (the necessity of which was surely apparent by January, 1976, if not before) had not received the attention of Mr. Sutter's firm. As of March 19, 1976, Mr. Willson referred to "my office's neglect" (A. 9a-10a), and in his affidavit of March 26, 1976, Mr. Sutter requested a thirty day adjournment to prepare the Rastelli trial.[19] If such time was actually requisite to preparation in a case which had been adjourned six or seven times since its commencement in March, 1975, was there not a wilful disregard of professional responsibility to the court and to the client which merited a contempt citation? Appellant Sutter knew of the scheduled date for his appearance in the Rastelli case and chose not to honor his commitment in federal court. His failure to appear was clearly by design, *Sykes* v. *United States*, 444 F.2d 928, 930 (D.C. Cir. 1971). The requirement of intent was satisfied by this "volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States* v. *Seale*, 461 F.2d 345, 368 (7th Cir. 1972). Appellant "deliberately or recklessly disregarded his obligation to the court" by failure to appear or provide competent counsel prepared to commence the trial on March 29, 1976. *Sykes* v. *United States*, *supra* at 930.

Cases cited by appellant and amicus curiae are distinguishable. In *Sykes*, *supra* 929, counsel relied on his memory rather than his appointment book and mis-

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[19] However, Mr. Sutter was able to prepare for the Nassau County case in four days and four nights (A. 92a).

takenly believed that he was scheduled to start a trial on Thursday, May 15, when the actual date was Thursday, May 8. The Court of Appeals reversed the contempt conviction on the ground that his failure to appear was "not by design but resulted from a lapse of memory." *Id.* at 930. Mr. Sutter, by contrast, exhibited no confusion or forgetfulness but candidly recognized that when he accepted the Charmont case he "well knew that he had a trial scheduled in the United States Disrtict Court . . . on March 29, 1976." (Appellant's Brief at 7).

In Re Williams, 509 F.2d 949 (2d Cir. 1975), involving a lay witness summarily convicted of criminal contempt, is inapposite. The Court of Appeals found ambiguity in the trial court's directions to the witness and held the absence of factual findings a serious omission under F.R. Crim. P. 42(a). That Rule regulating summary dispositions is not in issue in this case.

The same Rule was invoked in *In Re Farquhar*, 492 F.2d 561 (D.C. Cir. 1973), in which counsel was convicted of criminal contempt for appearing eight minutes late for the reconvening of a trial. He had simultaneous commitments before two courts, had *explained the conflict to both judges* but could not obtain a release from either. The appellate court reversed the conviction since the record disclosed no criminal intent on the part of counsel. In the instant case, Mr. Sutter informed neither court of the conflict in his engagements when such conflict arose and might have been reasonably resolved. In addition, Mr. Sutter proposed to arrive *one month* late in Judge Platt's court, not just eight minutes.

III

In conclusion, we submit that the actions of Judge Platt in this case were entirely proper, whether viewed in the context of Rule 8 or the requirements of criminal

contempt. The assessment of costs was fully justified by appellant's conduct and was imposed in a totally fair manner. Moreover, we would most respectfully urge this Court to reject the argument that the sanctions imposed by Judge Platt will have the effect of creating "an apprehensive atmosphere among members of the Bar." [20] On the contrary, we believe that an affirmance of Judge Platt's order will have a positive effect. Not only will it encourage attorneys to meet their professional responsibilities, but it will demonstrate that federal judges will be supported when they act to insure the efficient administration of justice in their courts.

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[20] Amicus Brief on Behalf of the Bar Association of Nassau County, page 17.

CONCLUSION

The order of the District Court should be affirmed.

Dated: August 6, 1976

Respectfully submitted,
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Eastern District of New York.

JOSEPHINE Y. KING,
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* The United States Attorney's Office wishes to acknowledge the assistance of Lawrence A. Dugan and Thomas C. Etter in the preparation of this brief. Mr. Dugan is a third year law student at Syracuse University College of Law. Mr. Etter is a third year law student at St. John's University School of Law.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 9th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

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Joseph W. Ryan, Jr., Esq.
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Sworn to before me this
9th day of August, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

Evelyn Cohen